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CENTRAL DIST. OF CALIF.
LOS ANGELES

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Attorney for Plaintiffs
Managed Pharmacy Care; Independent Living Center of Southern California, Inc; California Foundation for Independent Living Centers; Mark Beckwith; Gerald Shapiro, Pharm.D., dba Uptown Pharmacy & Gift Shoppe; Sharon Stern, dba Central Pharmacy; Tran Pharmacy, Inc., dba Tran Pharmacy; Odette Leonelli, Pharm.D., dba Kovacs-Frey Pharmacy; and Armen Tatevossian

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

Civil No. CV11-9211 (PJWx)

COMPLAINT

MANAGED PHARMACY CARE, a California corporation; INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., a California corporation; CALIFORNIA FOUNDATION FOR INDEPENDENT LIVING CENTERS, a California corporation; GERALD SHAPIRO, Pharm.D., doing business as Uptown Pharmacy & Gift Shoppe; SHARON STERN, doing business as Central Pharmacy; TRAN PHARMACY, INC., a California corporation, doing business as Tran Pharmacy; ODETTE LEONELLI, Pharm.D., doing business as Kovacs-Frey Pharmacy; MARKET PHARMACY, INC., doing business as Market Pharmacy; and MARK BECKWITH

Plaintiffs,

-vs.-

KATHLEEN SEBELIUS, Secretary of the U.S. Department of Health and Human Services; TOBY DOUGLAS, Director of Department of Health Care Services of State of California; and DOES 1 through 10

Defendants.

Plaintiffs complain of the defendants KATHLEEN SEBELIUS, Secretary ("Secretary") of the U.S. Department of Health and Human Services ("HHS"), and TOBY DOUGLAS, Director ("Director") of the Department of Health Care Services ("DHCS") of the State of California; and DOES 1 through 50, and for claims for relief allege:

JURISDICTION AND VENUE

1. The Court has jurisdiction under 28 U.S.C. §§ 1331 1391, 42 U.S.C. § 1983; the 14th Amendment Due Process Clause and Privileges and Immunities Clause; and the Administrative Procedure Act, 4 U.S.C. § 701 et seq. *Association of Data Processing Organizations, Inc. v. Camp*, 397 U.S. 150 (1970).

2. The actions of the Defendants complained of were and will be done in all parts of California, including the County of Los Angeles, and injure and cause, and will injure, and will cause an adverse effect upon the health, economic, and other interests of:

- Plaintiffs Mark Beckwith and Margaret Dowling;
- the pharmacy Plaintiffs; and the pharmacy members of the Plaintiff, Managed Pharmacy Care ("MPC"); and,
- the patients and clients of the pharmacy Plaintiffs; MPC; the Independent Living Center of Southern California, Inc. ("ILC"); and the California Foundation for Independent Living Centers ("CFILC").

The Defendants and the California Attorney General each has an office in the County of Los Angeles.

RELATED CASES

3. The following cases in the within Court:

	Court	Case No.
Independent Living Center of Southern California, Inc. v Douglas	D.C.Cal.,C.D.	2:08-cv-03315 CAS-MAN
Independent Living Center of Southern California, Inc. v Douglas	"	2:09-cv-0382 CAS-MAN
California Pharmacists Assn. v. Douglas	"	2:09-cv-0722 CAS-MAN
California Hospital Assn. v. Douglas	"	2:11-cv-09078 JHN-MRW
Douglas v. Independent Living Center of Southern California, Inc. (submission order vacated; further briefing ordered on November 4, 2011 on the issues raised by the same CMS rulings sued upon in the with MPC case, and the above *California Hospital* case, 2:11-cv-09078 JHN-MRW).	U.S. Supreme Court	Nos. 09-958 and 09-1158

are related to the within case, in that the primary facts, issues, evidence, and claims of the parties, and many of the parties, in these prior cases and the within case are identical. It would waste of judicial resources not to assign this new case to the same judge, namely, the Hon. Christina A. Snyder.

INTRODUCTION

4. DHCS is the single State agency which administers the federal-state funded health services program in California under the Medicaid Act, Title XIX, Social Security Act, ("S.S. Act"), § 1900 et seq.

5. This program is called "Medi-Cal." All references to "Medi-Cal" are to this Title XIX program in California.

6. Plaintiffs, pursuant to the Administrative Procedure Act, 5 U.S.C. § 701, et seq., challenge, and request judicial review of, and injunctive and declaratory relief to vacate and set aside the action of the Secretary of HHS, by and through Centers for Medicare and Medicaid

Services ("CMS"), an agency and agent of HHS: to wit, the October 27, 2011 action of CMS under the Medicaid Act, S.S Act, § 1902(a)(5) to approve a State Plan Amendment ("SPA") requested by the Director, which SPA, in its substance provides that payments by DHCS for services furnished on or after June 1, 2011, to Medi-Cal beneficiaries in the Medi-Cal fee-for-service program, – including pharmacy services including prescribed drugs, – shall be reduced by ten percent (10%); and that the Director may recoup the 10% amounts previously paid to Medi-Cal providers retroactive to June 1, 2011, (even though such services to and for the benefit of the State of California, performed at the special instance and request of the State, had a reasonable value equal to or more than the amount paid by the Medi-Cal program to each provider for that provider's services).

7. Each of the Plaintiffs, and the thousands of Medi-Cal beneficiaries who are the patients and clients of the Plaintiffs, are and will suffer legal wrong because of the agency action complained, and, also, have health, economic, professional and other cognizable interests which are and will be adversely affected and aggrieved, by the agency action complained of.

PARTIES

8. (a) The plaintiff **MPC** is a California corporation, which is resident in and whose principal place of business is in Lake Arrowhead, California.

9. (a) The plaintiff **ILC** is a nonprofit California corporation which was duly organized and incorporated in California on July 25, 1977 pursuant to the General Nonprofit Corporation Law of the State of California.

(b) ILC has its principal office and place of business in, and does business in the County of Los Angeles, California.

10. (a) The plaintiff **GERALD SHAPIRO**, Pharm.D., is a duly licensed registered pharmacist with License No. 24377, who owns and operates a duly licensed retail pharmacy

under the fictitious name of Uptown Pharmacy & Gift Shoppe, under retail pharmacy license No. PHY 41615, in the City of Los Angeles, California.

(b) The plaintiff SHAPIRO's pharmacy participates in the Medi-Cal fee-for-service program and also in the Medi-Cal managed care program, under Medi-Cal provider identification No. PHA 416150.

11. (a) The plaintiff SHARON STEEN is an individual who is a co-owner and operates a licensed retail pharmacy, under the fictitious name Central Pharmacy, under retail pharmacy license No. PHY 38051, in the City of Santa Monica, California.

(b) The plaintiff STEEN's pharmacy participates in the Medi-Cal fee-for-service program and also in the Medi-Cal managed care program, under Medi-Cal provider identification No. PHA 380510.

12. (a) The Plaintiff TRAN PHARMACY, INC. is a California corporation which owns and operates a duly licensed retail pharmacy under the fictitious name of Tran Pharmacy, under retail pharmacy license No. PHY 43647, in Garden Grove, California.

(b) The Tran Pharmacy participates in the Medi-Cal fee-for-service program and also in the Medi-Cal managed care program, under Medi-Cal provider identification No. PHA 436470.

13. (a) The plaintiff ODETTE LEONELLI, Pharm.D., owns and operates a duly licensed retail pharmacy under the fictitious name Kovacs-Prey Pharmacy, under retail pharmacy license No. PHY 48888, in Redondo Beach, California.

(b) The Kovacs-Prey Pharmacy participates in the Medi-Cal fee-for-service program and also in the Medi-Cal managed care program, under Medi-Cal provider identification No. PHA 488880.

14. (a) The plaintiff MARKET PHARMACY, INC. is a California corporation which owns and operates a duly licensed retail pharmacy under the fictitious name Market Pharmacy, in Northridge, California.

(b) The Market Pharmacy participates in the Medi-Cal fee-for-service program and also in the Medi-Cal managed care program

15. The plaintiff MARK BECKWITH is a quadriplegic Medi-Cal beneficiary who is a resident and citizen of Berkeley, California.

16. (a) The defendant DHCS is a department of the State of California. DHCS is the single State agency which, under S.S. Act, § 1902(a)(5), as well as under § 14000 et seq. California Welfare and Institutions ("Welf. & Inst.") Code, exclusively administers the Medi-Cal program.

(b) The defendant Director is the director of DHCS. The Director is exclusively empowered by §§ 14100.1 and 14105 Welf. & Inst. Code to set all policies, rules and regulations in the Medi-Cal program, including all rates payable to Medi-Cal providers. The Director has an office in the County of Los Angeles. The Director is sued in his official capacity, only.

(c) The defendant KATHLEEN SEBELIUS is the Secretary of HHS. She is sued in her official capacity, only.

17. Plaintiffs are each citizens and residents of the State of California, and in such capacity sue herein, also, cumulative to their other claims, on their own behalf, in their own interest, and in the interest of the Medi-Cal patients and clients of the Plaintiffs, and on behalf of the public, to procure the performance of public duty by each of the Defendants, as set forth hereinbelow.

18. Plaintiffs also sue in a prudential *jus tertii* capacity to assert their interests as well as the interests of the Medi-Cal patients and clients of the Plaintiffs, as the case may be.

19. Plaintiffs – and their Medi-Cal patients and clients on behalf of whom Plaintiffs sue herein, – also have standing and a claim for relief against the defendants inasmuch as each has suffered, will suffer, and is threatened to suffer, concrete and irreparable injury, defined at

the least as an adverse effect upon a health, economic, professional and other cognizable interest of the Plaintiffs, respectively, and of the patients and clients, respectively, of the Plaintiffs, unless the defendants are enjoined by the injunctions prayed for, or in the alternative, a judgment for declaratory relief is issued.

INTRODUCTION

20. Medi-Cal is a major component of the "safety net" that ensures the State's poor §have access to health care services.

STATUTE CHALLENGED

21. Assembly Bill ("AB") 97, enacted March 24, 2011 as part of Chap. 3, California Stats. 2011, amended Cal. Welf. & Inst. Code, § 14105.191 provides in substance that the Director shall adjust Medi-Cal provider payments, by reducing payments to pharmacies, by ten percent (10%) for Medi-Cal fee-for-service benefits, for dates of service on and after June 1, 2011; by reducing payments to managed health care plans in the Medi-Cal program by the actuarial equivalent amount of the Medi-Cal fee-for-service payment reduction; and, when federal approval is obtained, implement these payment reductions retroactively to June 1, 2011.

22. Specifically, Section 93.5 of AB 97 amended Cal. Welf. & Inst. Code, § 14105.192 to provide in relevant part:

> (c) Notwithstanding any other provision of law, the director shall adjust provider payments, as specified in this section.
>
> (d) (1) Except as otherwise provided in this section, payments shall be reduced by 10 percent for Medi-Cal fee-for-service benefits for dates of service on or after June 1, 2011.
>
> (2) For managed care health plans that contract with the department pursuant to this chapter or Chapter 8 (commencing with Section 14200), except contracts with Senior Care Action Network and AIDS Healthcare Foundation, payments shall be reduced by the actuarial equivalent amount of the payment reduction specified in this section pursuant to contract amendments or change orders effective on July 1, 2011, or thereafter.
>
> . . .
>
> (f) Subject to the exception for services listed in Subdivision (h), the payment reductions

required by subdivision (d) shall apply to the benefits rendered by any provider who may be authorized to bill for the service, including, but not limited to, physicians, podiatrists, nurse practitioners, certified nurse-midwives, nurse anesthetists, and organized outpatient clinics.

(m) Notwithstanding any other provision of this section, the payment reductions and adjustments provided for in subdivision (d) shall be implemented only if the director determines that the payments that result from the application of this section will comply with applicable federal Medicaid requirements and that federal financial participation will be available.

(1) In determining whether federal financial participation is available, the director shall determine whether the payments comply with applicable federal requirements, including those set forth in Section 1396a(a)(30)(A) of Title 42 of the United States Code.

(2) To the extent the director determines that the payments do not comply with the federal Medicaid requirements or that federal financial participation is not available with respect to payment that is reduced pursuant to this section, the director retains the discretion to not implement the particular payment reduction or adjustment and may adjust the payment as necessary to comply with federal Medicaid requirements.

. . .

(n) The department shall seek any necessary federal approvals for the implementation of this section.

(o) This section shall not be implemented until federal approval is obtained. When federal approval is obtained, the payments resulting from the application of subdivision (d) shall be implemented retroactively to June 1, 2011, or on such other date or dates as may be applicable.

AB 97 further provides:

SEC. 106. This act addresses the fiscal emergency declared and reaffirmed by the Governor by proclamation on January 20, 2011, pursuant to subdivision (f) of Section 10 of Article IV of the California Constitution.

SEC. 107. This act is a bill providing for appropriations related to the Budget Bill within the meaning of Section 12 of Article IV of the California Constitution, has been identified as related to the Budget Bill, and shall take effect immediately.

SEC. 108. This act is an emergency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to make the necessary statutory changes to implement the Budget Act of 2011 at the earliest possible time, it is necessary that this act take effect immediately.

23. Note: Subd. (o) provisions of subd. (o) relating to Cal,. Welf. & Inst. Code of Cal. Welf. & Inst. Code, § 14105.192 was amended June 29, 2011 by Sec. 13 of Chap. 29, Cal. Stats. 201, without any change to the substance of the provisions of subd. (o) relating to Cal,. Welf. & Inst. Code, § 14105.192.[1]

24. Hereinafter, all references to "AB 97" shall include and mean:

"AB 97, as amended by AB 102,"

unless otherwise stated.

FACTS COMMON TO ALL CLAIMS

25. At all times in the history of the Medicaid Act, there has been a substantial conflict of interest on the part of the Secretary, whose ultimate client is the United States. The conflict of interest is, that if Secretary looks the other way when a State does not provide sufficient payment to Medicaid providers to enable them to furnish quality health services as required by the Medicaid rate-setting law, 42 U.S.C. § 1396a(a)(30)(A) – "Section 30A," – then the public fisc of both the State and the United States profit greatly,

26. This conflict of interest of the Secretary has been publicly conceded by past Secretaries of HHS, in their amicus brief filed in the related case, *Douglas v. Independent Living*

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[1] Subd. (o) was therein amended relating to Cal. Welf. & Inst. Code, § 14105.192, to read as follows:

> (o) (1) The payment reductions and adjustments set forth in this section shall not be implemented until federal approval is obtained.
>
> . . .
>
> (3) When federal approval is obtained, the payments resulting from the application of this section shall be implemented retroactively to June 1, 2011, or on any other date or dates as may be applicable.

Thus, this amendment only involved changing the words in the prior subd. (o) of "on such other date or dates" to "on any other date or dates.: : which in essence is no meaningful change at all.

Center of Southern California, No. 09-958, ("*Independent Living I*"); (further briefing ordered, November 4, 2011, due to the CMS rulings in the within case at bar, and in the related case in the within court, *California Hospital Assn. v. Douglas*, 2:09-cv-09078 JHN-MRW).

27. Whether because of this public conflict of interest or despite it, the Secretary has never in the entire history of the Social Security Act, ever sued or imposed any penalty upon any State's failure to establish the minimum Medicaid provider reimbursement rates as required by Section 30A, namely, the minimum requirements of:

- setting payment rates in the procedural manner required by Section 30A, (namely, by a reasonable process which includes, at the least, consideration of the Section 30A factors of efficiency, quality of services, and equal access to services (the same as available to the general population in the same area), and quality of services; and,

- setting payment rates high enough to satisfy the quality and equal access provisions of Section 30A.

28. Four times, at the least, in 1987, (10% cut under Cal. Welf. & Inst. Code§ 14105), 2003 (5% across the board cut); 2008 (10% cut of AB 5), and 2009 (5% cut of AB 1183); each of which was enjoined by private action of providers and beneficiaries adversely affected by these cuts: not, by the Secretary at all, who did not oppose these cuts and argued at least once, (in 1987), they did not violate the Medicaid Act.

FIRST CLAIM FOR RELIEF

29. Now, still once again, the California legislature did, on March 24, 2011, enact AB 97 to reduce Medi-Cal provider rates across the board, including pharmacy rates, in the Medi-Cal fee-for-service system; and, to enact an actuarial equivalent payment reduction to all Medi-Cal managed care plans (who will inevitably, as surely as night follows day, pass this equivalent payment reduction to all *their* providers of services, including pharmacy services). (AB 97, as amended by AB 102, *supra*.) (Hereinafter, collectively, the "10% payment reduction.")

30. And once again, each of the California legislature, and the Director, acted in excess of and without jurisdiction, in conflict with and contrary to Section 30A, to enact AB 97, and the 10% payment reduction of AB 97, in violation, even deliberate violation, of Section 30A; with the violations consisting of this:

- the legislature enacted AB 97, and the 10% payment reduction of AB 97, purely for budgetary reasons, in which budgetary considerations were the conclusive if not the exclusive consideration in enacting the reduction; and, the Director likewise approved the 10% payment reduction, purely for budgetary reasons, in which budgetary considerations were the conclusive if not the exclusive consideration of the Director in approving and implementing the decision of the legislature to enact AB 97. Therein and thereby, the California legislature and the Director, respectively and successive, acted in excess of and without jurisdiction whatsoever or at all, in enacting and in implementing B 97 and the 10% payment reduction of AB 97, in respect to all Medi-Cal services including pharmacy services; including not only withholding 10% from all payments to Medi-Cal providers including pharmacies, in the Medi-Cal fee-for-service program; and also withholding 10% payments to Medi-Cal managed care plans who will in turn pass through this reduction to all providers, including pharmacies, in the Medi-Cal managed care program.

31. Also, the Director will unless restrained, recoup by self help and offsetting, all the 10% amounts paid by DHCS to Medi-Cal providers including the Plaintiffs, since June 1, 2011; ruining them, and preventing them from further serving their Medi-Cal patients; which (1) consists of taking of property of the providers, and endangering the lives and health of Medi-0Cal beneficiaries including the Plaintiff Mark Beckwith and those who are the patients and clients of the other Plaintiffs, all, in violation of and contrary to the Due Process Clause of the 14th Amendment and the Privileges and Immunities Clause of the U.S. Constitution.

32. Further, the fact that CMS has approved AB 97 and the 10% payment reduction of

AB 97 in respect to the Medi-Cal fee-for-service and managed care programs, is irrelevant, in that, CNS itself acted in excess of and without jurisdiction, contrary to Section 30A, the Supremacy Clause, and the 14th Amendment Due Process Clause, and Privileges and Immunities Clause, in approving the application of the State of California for a state plan amendment (SPA) to include this 10% payment reduction in the state plan required by 42 U.S.C. § 1396a(a) to be maintained at all times, as a condition to participate in the state/federal Medicaid program under the Medicaid Act; (all as set forth also, in the Second Claim for Relief).

33. The Plaintiffs have no plain, adequate, effective, or speedy relief whatsoever or at all, from the acts of the Director alleged above, which were void because in excess of and without jurisdiction, as set forth prior in this First Claim for Relief.

WHEREFORE, the Plaintiffs pray for relief as shall be hereinafter specified;

SECOND CLAIM FOR RELIEF

The Plaintiffs complain of the Secretary and for claim for relief allege:

34. Plaintiffs refer to and reallege each and all of the facts in the preceding Paragraphs as if fully set forth herein.

35. The Secretary acted in excess of and without jurisdiction, in whole and in every part, in approving the SPA for AB 97 and the 10% payment reduction of AB 97, for the same reasons as prior alleged in the preceding First Claim for Relief.

35. Independent of and without limitation of anything prior alleged, the Plaintiffs also allege that the Secretary violated Section 30A and the Administrative Procedure Act, by failing to consider whether the California legislature, and also the Director, considered the factors of efficiency, economy, quality of services, and equal access, and, failed to consider the fact that the State failed to consider any costs data or determine whether the reduced rates were reasonably related to costs of providers to furnish quality services; and the Secretary failed to consider whether the 10% reduced payment was consistent with quality of services and equal access; and,

used measures incompatible with and which could not possibly disclose whether the reduced payments were sufficient to enable providers, especially pharmacies, to provide quality services as required by Section 30A.

36. The Plaintiffs have no plain, adequate, effective, or speedy relief whatsoever or at all, from the acts of the Director alleged above, which were void because in excess of and without jurisdiction, as set forth prior in this First Claim for Relief.

WHEREFORE, the Plaintiffs pray for relief as follows:

1. That each of the defendants and their agents and successors be enjoined permanently, by preliminary injunction, and by temporary restraining order, from implementing AB 97 and from implementing the 10% payment reduction of AB 97, as amended by AB 102, whatsoever or at al.

2. That plaintiffs have reasonable attorneys fees, costs, and such other and further relief as may be just in the premises.

Attorney for Plaintiffs